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No. 05-06-12

IN THE

Supreme Court of the United States

UNITED STATES EX REL. KESHAV S. JOSHI, M.D.,

Petitioner,

v.

ST. LUKE'S HOSPITAL, INC., AND MOHAMMED BASHITI, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a complaint under the False Claims Act (FCA) by a *qui tam* relator plead "indicia of reliability" of the allegations of fraud under Fed. R. Civ. P. ("Rule") 9(b)?

2. When a plaintiff alleges that all the details of fraudulent activity are peculiarly within the control of the defendants, is it proper for a district court to refuse discovery before ruling on a motion to dismiss under Rule 9(b)?

3. Is an FCA *qui tam* relator subject to a different pleading standard compared to a claimant under the RICO statute because the *qui tam* relator suffered no "injury in fact?"

4. Is a district court's erroneous selection of one of a plurality of limitations periods insufficient for preserving the error?

5. Is a defendant entitled to bring up issues for the first time in a reply brief and for the first time on appeal at oral argument but a plaintiff is barred from raising new arguments for the first time on appeal?

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PETITION FOR A WRIT OF CERTIORARI

Relator Keshav S. Joshi, M.D. ("Dr. Joshi") hereby respectfully petitions for a writ of certiorari to review the judgment in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, at 1a-16a) is reported at 441 F.3d 552. The opinion of the United States District Court for the Eastern District of Missouri (App., at 17a-22a) is unreported.

JURISDICTION

The District Court entered its final judgment on April 13, 2005. Plaintiff filed a timely notice of appeal from that decision and the Eighth Circuit rendered a decision on March 6, 2006. App., at 1a. A timely motion for rehearing was filed on March 13, 2006, which the court denied on April 12, 2006. App., at 23a. The District Court's jurisdiction was predicated under 31 U.S.C. § 3729. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISIONS

This case concerns the standard to which a civil pleading alleging a violation of the False Claims Act's ("FCA" or "Act") *qui tam* provisions must comply pursuant to Fed. R. Civ. P. 9(b), when a plaintiff alleges that the information required is peculiarly within the control of a defendant. Another issue in this case is the proper interpretation of the tolling provisions of the 1986 Amendments to the FCA.

* * *

31 U.S.C. § 3731 provides in relevant part:

* * *

> (b) A civil action under section 3730 may not be brought—
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
> whichever occurs last.
>
> * * *

Fed. R. Civ. P. 9(b) provides in relevant part:

> In all averments of fraud * * *, the circumstances constituting fraud * * * shall be stated with particularity.
>
> * * *

STATEMENT

This case raises a question of broad and general importance: What is the proper standard of pleading under Fed. R. Civ. P. ("Rule") 9(b) when the information required for the pleading standard is peculiarly within the sole control of the defendant? The several circuits are clearly split over the issue. A clear majority of the circuit courts of appeals permits a plaintiff to engage in limited discovery and thereafter amend the complaint with the required allegations. The Eighth Circuit adopted a minority approach only in *qui tam* cases under the FCA, which makes it ripe for review in this Court. Further, as stated, though most Circuits apply the same standard of particularity for all complaints alleging any kind of fraud, the Eighth Circuit created a new species out of a *qui tam* case and stated that because such a relator did not suffer "injury in fact", he must set forth "indicia of reliability" setting forth the "basis" of the allegations in the pleading to survive a motion to dismiss under Rule 9(b). App., at 8a-9a, and distinguished a *qui tam* case from a case under the

Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1964(a) ("RICO").

Accordingly, Petitioner requests the Court to take this case and resolve the following related questions: What is the proper pleading standard under Rule 9(b)? Do the rules of civil procedure distinguish between one kind of fraud from another? Is a case filed under the FCA's *qui tam* provisions so fundamentally different from that filed under the RICO statute that the civil pleading rules are more strictly applied to the former and relaxed in the case of the latter? In a *qui tam* case is the motivation of a relator or the status of a defendant relevant to the pleading standard? The answer to these questions affects every case to which a heightened pleading standard is imposed—whether judicially, statutorily or via Rule 9(b).

A. The 1986 Amendments to the False Claims Act

According to the False Clams Act, any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval" is liable for treble damages and civil penalty of up to $11,500 per violation. 31 U.S.C. § 3729(a); see also *Vermont Agency of Nat. Resources* v. *United States ex rel Stevens*, 529 U.S. 765 (2000)(for origins of *qui tam* laws).

In 1986, Congress overhauled the FCA in response to reports of the "growing pervasiveness of fraud" in Government contracts and programs. S. Rep. No. 345, 99th Cong., 1st Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Recognizing that the Government alone lacks the resources to detect and punish fraud adequately, Congress amended the FCA to "allow and encourage assistance from the private citizenry," which it expected to "make a significant impact on bolstering the Government's fraud enforcement effort." *Id.* The 1986 Amendments to the Act

contained several changes both to the Act's general provisions and to its *qui tam* whistleblower provisions. Strengthening the law's *qui tam* provisions was a crucial part of the legislature's strategy:

> The proposed legislation seeks * * * to encourage any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.

Id., 1986 U.S.C.C.A.N. at 5266-67. The principal purpose of this legislative overhaul was to "increase[] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Ibid.*; see also, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 133 (2003)(FCA Amendments "enhanced the incentives for relators to bring suit"). Accordingly, the Congress enhanced the potential recovery to relators, relaxed the bar against *qui tam* actions based on information in the government's hands, and authorized relators to maintain an active role in the suit even if the government intervenes. See § 3, 100 Stat. 3154-3157.

As amended, 31 U.S.C. § 3730(b) provides that a private citizen, a *qui tam* relator may bring a civil action for a violation of 31 U.S.C. § 3729 "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). When a relator files a *qui tam* action under 31 U.S.C. § 3730(b), the complaint must be filed under seal, and the relator must provide a copy of the complaint and supporting information to the United States, which has 60 days to decide whether to intervene in the suit, 31 U.S.C. § 3730(b)(2), although that 60-day period may be extended for good cause shown, see 31 U.S.C. § 3730(b)(3). If the government intervenes, it shall have the primary responsibility for prosecuting the action, although the

relator has a right to continue as a party in the litigation, subject to certain limitations. See 31 U.S.C. § 3730(c). If the government does not assert its statutory right to take over the case, the relator can recover at least 25 percent but no more than 30 percent of any monies recovered from a settlement or judgment, in addition to reasonable expenses and attorneys' fees and costs. 31 U.S.C. §§ 3730(b)(4)(B), (d)(2).

Prior to the 1986 Amendments, the FCA provided for a six-year limitations period, 31 U.S.C. § 3731(b) (1982). In 1986, Congress added a provision tolling the period by three years if the information about the fraud on the Government is brought to the attention of an "official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2).

This public-private partnership has served its intended purposes. Since 1986, the Federal Government has obtained over $12 billion in judgments and settlements in civil fraud cases, largely due to the efforts of whistleblowers. See Press Release, *False Claims Act Recoveries Exceed $12 Billion Since 1986* (Department of Justice, Nov. 10, 2003), *available on the Internet at* http://www.usdoj.gov.

B. Background of this Case

Petitioner Keshav S. Joshi, M.D., ("Dr. Joshi") is a board-certified anesthesiologist employed as a staff anesthesiologist at St. Luke's Hospital ("hospital") from 1989 to 1996. App., at 2a. He filed a *qui tam* action against the hospital and its chief anesthesiologist Dr. Mohammed Bashiti (collectively, defendants), *id.*, at 17a, violated the False Claims Act when they (a) falsely certified, submitted bills to and received payments from the Medicare and Medicaid programs when they billed for work done by medically unsupervised and undirected nurse anesthetists' work, which Dr. Bashiti signed off after the

fact without supervision or direction; and (b) falsely billed the Government's Medicare and Medicaid programs for an entire box of supplies for each patient, while in fact using portions of a box of supplies for several patients, thus billing for the same supplies more than once. *Id.*, at 2a-3a.

In 2001, Dr. Joshi filed the original complaint under seal and served the United States Attorney with a copy of the complaint and the necessary affidavit. The United States declined to intervene, and in November 2002, Dr. Joshi voluntarily dismissed the action without prejudice[1]. In April 2004 Dr. Joshi refiled the action under seal, and served the United States Attorney with the required papers, whereupon the United States declined to intervene once again. Then Dr. Joshi served the complaint on the defendants. In accord with local rules of the Eastern District of Missouri, the case was assigned to the same district judge who had originally presided over the matter.

The defendants appeared and moved[2] to dismiss alleging that Dr. Joshi's complaint failed to comply with the requirements of Rule 9(b), which requires that all averments concerning the "circumstances" of fraud be pled with particularity. The defendants claimed that without the names of patients and the dates and invoice numbers, they would not be able to defend the action.

Dr. Joshi opposed the motion stating that (a) he alleged that each and every the defendants' bills for all the nurse anesthetist work was fraudulent, there was no need for the times, dates and patient names; (b) any additional details

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[1] The court of appeals ignored Dr. Joshi's request to take judicial note of these critical facts and stated inaccurately, App., at 2a & 11a, that Dr. Joshi filed the case in 2004.

[2] The hospital moved to dismiss and Dr. Bashiti joined in the hospital's motion. App., at 17a, n.1.

were peculiarly within the exclusive control of the defendants, which incident should accord him limited discovery to provide the dates and names of patients, (c) requiring one to disclose patient names in a complaint is in tension with the healthcare privacy laws as it requires violation of other laws to bring a *qui tam* case.

Dr. Joshi further argued in the District Court that the United States Attorney objected to his subpoena for the information, which subpoena, if enforced, would provide the information. Dr. Joshi requested the District Court's leave to amend to provide some details for one month in November 1995 as an example of the fraud committed against the Government. In support of the motion for leave to amend, Dr. Joshi gave the exact dates, times and operation theaters where Dr. Bashiti provided anesthesia services to his patients, at which exact times, at other operation rooms other unsupervised nurse anesthetists provided anesthesia services to their own patients. Dr. Joshi identified dates, patient initials and the quantities of the supplies that were prescribed and alleged that the hospital invoiced for a larger amount than was administered to the patients, each of which incident, standing alone, would be in violation of the FCA.

In response, the defendants argued in the reply brief that the details Dr. Joshi gave fell beyond a six-year statute of limitations. In a surreply, Dr. Joshi objected[3] to the defendants' raising new issues in a reply brief.

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[3] This has been the practice of the Eighth Circuit, see *Mahaney* v. *Warren County*, 206 F.3d 770, 771 n.2 (8th Cir. 2000)("Claims not raised in an initial brief are waived."), until it *sub silentio* ignored that rule when it stated that Dr. Joshi "erroneously" relied on its precedent. App., *infra*, at 11a, n.3.

C. The District Court's decision

The district court dismissed the complaint without leave to amend, stating that any amendment would have been futile in that the proposed amendments fell outside of a six-year statute of limitations period, and further that the complaint failed to comply with Rule 9(b). Denying Dr. Joshi's motion for leave to amend, the District Court stated:

> Although Joshi alleges a continuous violation, he provides no specific allegations of fraud within the limitations period that would tie these otherwise time-barred claims into a continuous pattern of conduct. Even with these additional allegations, defendants are still forced to speculate as to names of patients, supplies, prescriptions, and claims over a sixteen-year period to determine what activity allegedly violates the FCA

App., at 23a[4]. The District Court declined to permit discovery, while acknowledging Plaintiff's allegation that the essential information was peculiarly within the control and possession of the defendant, noted that the Eighth Circuit had ruled on that issue, but that it agreed with the First and the Eleventh Circuits which denied discovery. *Id.*, at 21a. On the limitations issue, the District Court inexplicably applied a wrong provision—six-year period—rather than 31 U.S.C. § 3731(b)(2), *id.*, at 19a, n.3, which was a clear error because the same district judge presided over and dismissed the first-filed compliant.

Dr. Joshi appealed, arguing that the District Court erred in ignoring the three-year tolling period under 31 U.S.C. §

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[4] The District Court ruled that because Dr. Joshi alleged a continuing violation, it would deny the motion to dismiss, App., at 20a, but inexplicably dismissed the case in the same opinion. *Id.*, at 23a.

3731(b)(2), which, if acknowledged, would remedy any limitations objection. Dr. Joshi also argued that the information he provided was sufficient because he alleged a continuing violation. Dr. Joshi further argued that the District Court erred in not recognizing that the nature of allegations in the complaint—that each and every invoice to the Government for nurse anesthetist work was fraudulent—obviated any need for more particulars. Dr. Joshi additionally argued that the remaining information was peculiarly within the defendants' control, and therefore he should have been permitted discovery before ruling on the motion to dismiss, which was the practice of the majority of Courts of Appeals.

D. The Court of Appeals' opinion

The Court of Appeals acknowledged that its decision was in conflict with the precedent of several other courts of appeals including the Fifth Circuit in *United States ex rel. Doe* v. *Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003), but declined to follow them and instead followed the "more recent" rulings from the First and the Eleventh Circuits, *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 229 (1st Cir. 2004) and *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002), which held to the contrary. App., at 13a.

The court below distinguished an Eighth Circuit decision, *Abels* v. *Farmers Commodities Corp.*, 259 F.3d 910, 920-21 (8th Cir. 2001), and a Seventh Circuit case *Emery* v. *American Gen. Fin., Inc.*, 134 F.3d 1321, 1324-25 (7th Cir. 1998), stating that these RICO cases were different because a *qui tam* relator suffers no "injury in fact," and that a *qui tam* relator might obtain a "windfall" and expressed concern that permitting discovery would allow a *qui tam* relator to find out unknown wrongs, *id.*, at 12a. Though it conceded the difficulty for an anesthesiologist in accessing invoices, *id.*, at 8a & 15a, the court below required that one must plead invoice number

and invoice date of fraudulently submitted invoices[5] as well as "indicia of reliability"—in addition to describing when, where, how and who committed fraud—in order to meet Rule 9(b). *Id.*, at 8a (relying on *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005)(per curiam)). On limitations, the court below held that Dr. Joshi should have argued that his complaint did not "specifically" argue tolling period in the District Court, App., at 11a, and that he could not raise issues for the first time on appeal[6], but that the tolling provisions would not alter the outcome.

By the time the Eighth Circuit issued its opinion the Eleventh Circuit had restricted the scope of *Corsello* in *United States ex rel. Walker* v. *R & F Props. of Lake*

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[5] The Eighth Circuit declined to follow the district courts that denied motions to dismiss when a plaintiff alleged that an entire class of invoices was fraudulent, or that fraud took place over a long period of time, or that the fraudulent scheme was too complex to be described with requisite particulars without at least some discovery. The Eighth Circuit declined to consider the complexity of fraud as a factor in determining the need for pre-Rule 9(b) discovery, implying that the complexity was not of the fraudster's scheme, but that of the "edifice" the relator constructed. App., at 16a. This ignores that Congress tolled the limitations period expressly to allow for late discovery and prosecution of complex fraudulent schemes. See S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (stating that Congress created the limitations periods set out in 31 U.S.C. §§ 3731(b)(1) and (b)(2) in light of difficulty in tracing fraudulent conduct.)

[6] The Eighth Circuit contradicted itself when it held that Plaintiff is barred from raising issues for the first time on appeal, but nevertheless relied heavily on *Corsello*, which the defendant brought for the first time on appeal at oral argument. Dr. Joshi requests this Court to judicially note that *Corsello* was published after written briefs were filed in this case.

County, Inc., 433 F.3d 1349 (December 30, 2005). Dr. Joshi timely but unsuccessfully sought rehearing.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. The court of appeals' decision is inconsistent with the precedent of this Court and decisions of other courts of appeals.

In a key part of its ruling, the Eighth Circuit held that a *qui tam* relator must allege more than what is required of an ordinary fraud claimant, and stated that a *qui tam* relator must provide invoice numbers, patient names and dates of invoicing to the Government in order to survive a motion to dismiss under Rule 9(b). This is not only a direct contravention to the liberal pleading rules this Court inaugurated more than 50 years ago, but also conflicts with at least eight other circuit courts of appeals.

On the issue of permitting discovery before ruling on a Rule 9(b) motion, the District Court relied on the Eleventh Circuit's holding in *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002) which ruled against permitting discovery pending ruling on a Rule 9(b) motion. On appeal, the Eighth Circuit ruled that a RICO plaintiff was different from an FCA *qui tam* relator in that the latter suffered no "injury in fact," and relied on a subsequent decision by the Eleventh Circuit, *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005)(per curiam), which inaugurated an "indicia of reliability" test for FCA *qui tam* relators. By the time the Eighth Circuit had issued its written opinion, the Eleventh Circuit limited *Corsello* in *United States ex rel. Walker* v. *R & F Props. of Lake County, Inc.*, 433 F.3d 1349 (December 30, 2005), but the Eighth Circuit did not rehear the case despite the basis on which it erected its logical edifice crumbled.

In requiring that the FCA *qui tam* relator show more than any other civil plaintiff, the Eighth Circuit also gave a blueprint to future fraudsters: they need only separate the defrauding activity from the invoicing activity in order to escape enforcement by a diligent relator for one who is aware of the fraudulent activity is unlikely to be privy to the exact date, time and number of the invoice, and *vice versa*, without which details the Eighth Circuit held that a pleading is insufficient.

The Eighth Circuit has thus created a special category out of a *qui tam* relator by construing Rule 9(b) favorably to accused fraudsters. The "indicia of reliability" requirement is a dangerous pleading requirement because it necessarily invites subjective decision-making, and opens the door to illegal qualifications for would-be *qui tam* relators based on gender, race, or socio-economic status. Rule 9(b) should not be interpreted to require qualifications for the right to sue or be sued under the FCA, but the Eighth Circuit did exactly that. This case is a good example that if left unchecked, the test for reliability of an informer's information at the pleading stage would go awry; the Eighth Circuit implied that Dr. Joshi's personal animus against the defendant or his desire for windfall made his information inherently less reliable or "second hand." App., at 16a.

A. There is an acknowledged circuit split on the issue of whether discovery should be permitted before ruling on a Rule 9(b) motion when the required information is within the sole control of the defendant.

Taking a negative view of private whistleblowers who bring suits on behalf of the Government and their own behalf, the Eighth Circuit distinguished its own rulings,

acknowledged a circuit split[7], denied rehearing even though the ruling from the Eleventh Circuit upon which it relied was distinguished in the interim and held that a *qui tam* relator should not be given discovery prior to a District Court's ruling on a Rule 9(b) motion. The court below stated, "We join the more recent decisions and therefore reject Dr. Joshi's request to permit discovery to satisfy Rule 9(b). As the First Circuit noted, '[t]he reluctance of courts to permit qui tam relators to use discovery to meet the requirements of Rule 9(b) reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs.'" App., at 13a (citations omitted).

Contrarily, nearly every other Court of Appeals permits discovery before ruling on a motion to dismiss predicated on Rule 9(b). See, *e.g.*, *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1225 (1st Cir. 1996); *Devaney* v. *Chester*, 813 F.2d 566, 569 (2d Cir. 1987); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997); *Shapiro* v. *UJB Financial Corp.*, 924 F.2d 272, 285 (3d Cir. 1992)(relaxing Rule 9(b)'s particularity requirement when plaintiffs "allege defendants' exclusive control over * * * information" and "delineate * * * the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity"); *Smith* v. *Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 446 (5th Cir.1992); *United States ex rel. Doe* v. *Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003) (holding that the particularity requirements of Rule 9(b) may be relaxed in an FCA *qui tam* action where the information relevant to the fraud is "peculiarly within the perpetrator's

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[7] After acknowledging that there is a circuit-split, the Eighth Circuit elected to follow the minority of the jurisdictions that did not permit such discovery, stating "few courts have actually applied such a standard," App., at 13a, which is incorrect.

knowledge."); *United States ex rel. Russell* v. *Epic Healthcare Management Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Bldg. Co.* v. *Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988)("Courts have held that [Rule 9(b)] may be relaxed where information is only within the opposing party's knowledge."); *Emery* v. *American Gen. Fin., Inc.*, 134 F.3d 1321, 1324-25 (7th Cir. 1998)("We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint. But Rule 9(b) is relaxed upon a showing of such inability."); *Katz* v. *Household Int'l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996); *Abels* v. *Farmers Commodities Corp.*, 259 F.3d 910, 920-21 (8th Cir. 2001)("The special nature of fraud does not necessitate anything other than notice of the claim; it simply necessitates a higher degree of notice * * *.")(RICO case); *United States ex rel. Lee* v. *SmithKline Beecham, Inc.*, 245 F.3d 1048 (9th Cir. 2001) ("Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession"); *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994).

The only two circuits that rejected discovery prior to ruling on a motion to dismiss are the First and the Eleventh Circuit decisions in *Karvelas* and *Clausen* respectively. At oral argument[8], the defendants brought up a decision from

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[8] Note the court below stated that one may not raise new arguments for the first time on appeal, App., at 12a, but nevertheless permitted the defendant to raise new argument for the first time at oral argument. *Id.*, at 6a. The Eighth Circuit further allowed the defendant's argument for the first time in the

(Continued on following page)

the Eleventh Circuit, *Corsello*, which apparently reinforced *Clausen* and introduced a new condition to pleading standards of a *qui tam* plaintiff. *Clausen* held that one must plead not just "circumstances" of fraud, but facts, and further provide "indicia of reliability" of these facts, thus imposing an evidentiary proof requirement at the pleading stage.

The Eighth Circuit adopted *Corsello* in its entirety[9], and set forth that a person should not only have direct and

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reply brief in the District Court and faulted that Dr. Joshi erroneously objected to it on procedural grounds. *Id.*, at 11a, n.3. The court below stated that Dr. Joshi filed the case in 2004, and omitted any mention of the first complaint filed in 2001, though at App., 11a, n.3, the court below implies that had Dr. Joshi raised the tolling argument in the District Court, he would have succeeded, which indicates that the Eighth Circuit panel recognized the import of the first filing to the tolling provisions, but it nevertheless omitted any reference to the first filing in its opinion. Such failure to recognize facts renders judicial decisions flawed and leaves too much to the whim of the courts, which is not the correct practice. See, *e.g., Ebay, Inc.,* v. *MercExchange, LLC*, 547 U.S. __ (No. 05-130, May 15, 2006)(Roberts, C.J., concurring)("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.")(quotation omitted). When courts, which are required to take all pertinent facts into consideration in delivering justice, ignore key facts favoring a party, omit or misstate them, the difference between judging and advocating vanishes.

[9] As noted above, between the time oral argument took place and the time the decision was published in this case, the Eleventh Circuit distinguished *Corsello* in *Walker*, stating that the *Corsello* relator was a competitor whereas the *Walker* relator was a staff nurse. The opinion below does not acknowledge that the defendants argued statute of limitations in the District Court in the reply brief, or that the defendants argued *Corsello* for the first time at oral argument.

original source of information for the suit, but also must have the invoice numbers and invoice dates of the allegedly fraudulent invoices, in addition to "indicia of reliability". Noticeably, neither the Eleventh Circuit, nor the Eighth Circuit explained the legal basis for imposing the "indicia of reliability" standard or how it could be met. The Eleventh Circuit opined that a competitor could not meet the standard, whereas the Eighth Circuit stated that one with animus against the defendant or one who seeks "windfall" likely could not meet the standard.

Suppose, to use a slightly-altered hypothetical Judge Wollman posed at oral argument, a janitor overhears in the wash-room an agreement between executives of a business to double-bill the Government. Should the status of the relator as a janitor be relevant to judging "reliability" of this information? Is any more than this information required to file a *qui tam* suit? Qualifying would-be *qui tam* relators based on arbitrary criteria would invariably lead to illegal considerations such as race, gender or socio-economic status of the relator, which makes this highly subjective and dangerously inconsistent with the Equal Protection Clause.

Further, the Eighth Circuit stands alone in creating special pleading rules only for *qui tam* cases. It argues that permitting discovery before ruling on a Rule 9(b) motion would be inconsistent with the obligations of the relators, who must submit a sealed complaint and an affidavit to the United States Attorney in order to permit the Government to decide whether to intervene. App., at 13a-14a. This argument presumes that evidence must be pled in an FCA case and overlooks that on showing "good cause" the United States Attorney may intervene at any stage of the litigation. 31 U.S.C. § 3730(c)(3). Furthermore, the United States Attorney can issue administrative subpoenas and Civil Investigative Demand (CID) but a relator does not have such devices to conduct prefiling investigation.

See 31 U.S.C. § 3733 (permitting the Attorney General to issue CIDs compelling the production of evidence)

The Eighth Circuit created a false distinction between fraud on the Government, 31 U.S.C. § 3729, which was the focus of FCA, versus RICO, which was designed to reign in "infiltration of legitimate business organizations by racketeers," *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000), and set itself apart from every other Court of Appeals. It stated, App., at 15a, n.4, that the "original source" requirement, 31 U.S.C. § 3730(e)(4)(B), was not present in the RICO statute. It is like arguing that RICO is also different from any other fraud case for Rule 9(b) purposes because it requires an "enterprise," 18 U.S.C. § 1961(4), or that the defendant violate one of the enumerated predicate acts. If there were no peculiarities to each of the statutes, it goes without saying that there would be no reason to enact different statutes. The distinction between RICO and FCA cases is wrong because the mere existence of two different statutes addressing two different violations should not by itself result in different pleading standards. Nothing in Rule 9(b) permits such distinction.

In contrast, every other circuit uniformly applied the same pleading standard for all types of fraud cases[10]. To make this distinction for *qui tam* cases, the Eighth Circuit departed from its own precedent. See *Iverson* v. *Johnson Gas Appliance Co.*, 172 F.3d 524, 531 (8th Cir. 1999)(reversing summary judgment by a district court that refused to permit any discovery)(citation omitted); see also *Costello, Porter, Hill, Heisterkamp & Bushnell* v.

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[10] See, *e.g.*, *Gold* v. *Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2nd Cir. 1995) (collecting cases); see also, *United States ex rel. Russell* v. *Epic Healthcare Management Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999).

Providers Fidelity Life Ins. Co., 958 F.2d 836, 839 (8th Cir. 1992) (where "information needed * * * to respond to plaintiff's summary judgment motion is in the sole possession of the plaintiff," granting of summary judgment without discovery was held to be "not fair" because it "tie[d] the only hand a party has to defend itself.")

The Eighth Circuit also ignored several courts that denied Rule 9(b) motions because the information is sufficient to place a defendant on notice. *E.g.*, *United States* v. *Pogue*, 977 F. Supp. 1329 (M.D. Tenn. 1997)(information is sufficiently specific to identify the fraudulent acts and thus no need to specify dates or employees); *United States* v. *United Technologies*, No. C-3-99-093, 2000 WL 988238 (S.D. Ohio March 20, 2000)(complaint alleged that all the invoices of a particular government contract were fraudulently inflated); and *United States ex rel. Roby* v. *Boeing Co.*, 184 F.R.D. 107 (S.D. Ohio 1998)(allegation that every invoice for gears used in CH-47D Chinook helicopters was sufficiently particular); *United States* v. *NHC Health Care Corp.*, 115 F. Supp. 2d 1149 (W.D. Mo. 2000)("When an underlying fraudulent activity is alleged to have occurred systematically and continuously over a period of time it is sufficient to allege a general time frame of the fraud in question."); *In re Cardiac Devices* Qui Tam *Litigation*, 221 F.R.D. 318, 333 (D. Conn. 2004)("It is only common sense that the sufficiency of pleadings under Rule 9(b) may depend upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary to give notice to the adverse party and enable him to prepare a responsive pleading. * * * To approach the issue otherwise would allow the more sophisticated to escape liability under a False Claims case due to the complexity of their scheme and their deviousness in escaping detection."); *United*

States ex rel. Taylor v. *Gabelli*, 345 F. Supp.2d 313, 326 (S.D.N.Y. 2004); *United States* v. *NHC Health Care Corp.*, 115 F. Supp. 2d 1149, 1153 (W.D. Mo. 2000)("The Defendant complains that many details are left out of the Complaint such as what specific services were not provided. However, this type of more specific information is likely not in the possession of the Plaintiff at this time and is more properly brought to light in discovery." and that Rule 9(b) was never meant to "require a plaintiff to set forth every factual detail supporting its claim, nor was it meant to fuse the stages of pretrial investigation and discovery."); *United States ex rel. Mikes* v. *Straus*, 853 F.Supp. 115, 119 (S.D.N.Y.1994) (holding that the plaintiff is not required to provide information at the complaint stage which is not available to him); *McHale* v. *NuEnergy Group*, No. Civ. No.. 01-4111, 2002 WL 321797, at *3 (E.D. Pa. Feb. 27, 2002) ("Allegations of 'date, place, or time' fulfill these functions, but nothing in the rule requires them. A plaintiff is free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.").

The heightened pleading requirement the Eighth Circuit imposed on a *qui tam* relator militates against the text, history and stated Congressional intent and purpose behind the 1986 Amendments to the Act, which created incentives and enhanced the bounty for *qui tam* relators in the wake of embarrassing enforcement lapses by the Attorney General. See *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 133 (2003)(FCA Amendments "enhanced the incentives for relators to bring suit").

B. The Eighth Circuit ruled inconsistently with this Court when it held that a *qui tam* relator suffered no "injury in fact"

The Eighth Circuit's statement that a *qui tam* relator suffered no "injury in fact" is directly contrary to this Court's holding in *Vermont Agency of Nat. Resources* v.

United States ex rel Stevens, 529 U.S. 765 (2000), where this Court upheld a *qui tam* relator's standing to sue on behalf of the Government because "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.*, at 773 & n.4. *Stevens* also held that a *qui tam* relator suffers an injury in fact, though it remains inchoate until he obtains a judgment. *Id.*, at n.3 (citing 2 W. Blackstone, Commentaries, § 437).

The Eighth Circuit's contradiction of this Court's holding not only muddles the issue of standing to a *qui tam* plaintiff, but also creates a different class of plaintiffs out of *qui tam* relators, which is unsupported by either the text or the history of the FCA. Such contravention of this Court's express findings is inconsistent with the principle of *stare decisis* or of the hierarchy of the Courts. It also violates the idea that it is "this Court's prerogative alone to overrule one of its precedents" *State Oil Co.* v. *Kahn*, 522 U.S. 3, 20 (1997) and that lower courts are bound by this Court's precedent regardless of the circumstances, including when this Court's ukase is in tension with later holdings of this Court. *Agostini* v. *Felton*, 521 U.S. 202, 237 (1997) (reaffirming that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

C. The Eighth Circuit imposed an additional burden of pleading "indicia of reliability" in an FCA *qui tam* complaint

Though time and again this Court upheld the principle that in ruling on a motion to dismiss, a Court should consider all the facts in favor of the non-movant, see *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. __ (No. 04-433, June 5, 2006)("Because this case arises from a motion to dismiss, we

accept as true the factual allegations in the amended complaint.")(citing *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U. S. 163, 164 (1993)), the Eighth Circuit reversed the presumption of truth and imposed a new burden requiring "indicia of reliability" to the plaintiff's allegations. App., at 8a-9a. Clearly, this holding cannot be reconciled with the consistent holdings of this Court and every other court of appeals that a district court should accept as true the allegations when ruling on a motion to dismiss, rather than question the reliability of the facts alleged, which is solely the job of the fact-finder.

The Eighth Circuit endorsed and adopted this novel standard by relying on an Eleventh Circuit case, *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005)(per curiam), which the defendants brought up for the first time at oral argument, without a chance for Dr. Joshi to show its wrongfulness. Even more curiously, by the time the Eighth Circuit published its opinion post-argument, the Eleventh Circuit itself watered down the "indicia of reliability" test, see *United States ex rel. Walker* v. *R & F Props. of Lake County, Inc.*, 433 F.3d 1349 (December 30, 2005), but the Eighth Circuit denied rehearing.

Apart from being inconsistent with the long and firmly-entrenched rule of practice[11] of not requiring evidence in a

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[11] See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974)(stating that a court *must* regard as true all factual allegations in a complaint and draw all reasonable inferences flowing from those facts in favor of the plaintiff); see also, *NOW* v. *Scheidler*, 510 U.S. 249, 255 (1994) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992))(stating that in considering a Rule 12(b)(6) motion, a court must "presume that general allegations embrace those specific facts that are necessary to support the claim."); *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984)(stating that a court should not dismiss a complaint for failure to state a claim unless if it is clear that no

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pleading, this new test requires "reliable" evidence at the complaint stage, and fails to state how or who will judge the "reliability" of the evidence presented, and why this would not run afoul of the notice-pleading regime, which pushed the challenge to the merits of a complaint (including evidentiary issues such as admissibility or sufficiency) to the summary judgment stage. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512-13 (2002)("The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.") (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202, p. 76 (2d ed. 1990)).

In addition to the novel "reliability" test, the Eighth Circuit imposed another pleading requirement on plaintiffs. The court below stated, App., at 11a, n.3, that "Dr. Joshi did not argue the proposed amendment fell within the limitations period", but this creates a new rule that one should plead against *anticipated* affirmative defenses, which is also not the law. This statement also ignores that at the time he proposed an amendment to the complaint, Dr. Joshi had no reason to argue limitations period, and that it was the defendants who improperly brought up the argument for the first time in a reply brief, to which Dr. Joshi objected. There is no requirement for a plaintiff to anticipate and address all possible objections in order to preserve an issue for appeal, because such requirement results in tomes to be written in order to protect oneself from a judge who may dismiss the case based on one of the

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relief could be granted under any set of facts that could be proved consistent with the allegations); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

many local rules. Preserving an error does not require guesswork or addressing every possibility, and a district court's passing on a matter is sufficient. One also need not present and negate affirmative defenses in a complaint. The Eighth Circuit is wrong.

The impetus for the Court of Appeals' multiple erroneous positions apparently came from its view that a defendant should be protected from a relator's personal animus or hope for a "windfall." Contrarily, this Court justified the "bounty" a *qui tam* relator receives, stating:

> "'[Qui tam statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow going public vessel.'"

Hughes Aircraft Co. v. *United States ex rel. Shumer*, 520 U.S. 939, 951 (1997)(quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 , n. 5 (1943) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Ore. 1885))). The strong stimulus of personal ill will or the hope of financial gain, which this Court cited approvingly[12] as reasons to permit *qui tam* suits became "windfall"

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[12] This Court acknowledged the potential for abuse of informer suits, *Stevens*, 529 U.S., at 775 (stating that laws related to obsolete offenses were repealed or vexatious informers had been subject to penalties in order to deter their usage to "vex and entangle the subject") (citations omitted), but it is the duty and prerogative of the legislature and not the courts to decide whether to permit or limit such suits as a matter of policy.

deserving an inferior status in the eyes of the Eighth Circuit's panel. That error should also be remedied.

The Eighth Circuit's ruling also departed from this Court's practice when the law is clarified or interpreted for the first time. Though it stated that some issues presented were of "first impression," App., at 12a, and created a new standard of "indicia of reliability" for a *qui tam* relator, it did not remand the case to accord an opportunity for Dr. Joshi to conform to the newly promulgated law. The court of appeals' denial of a chance to Dr. Joshi to develop and present his arguments on these points is inconsistent with this Court's practice, see *e.g.*, *Illinois Tool Works, Inc.* v. *Independent Ink, Inc.*, 547 U.S. __ (No. 04-1329, March 1, 2006)(Stevens, J.)(stating that because respondent reasonably relied on the Court's prior decisions in failing to offer evidence on market definition or proving defendant's market power, it should be given a "fair opportunity to develop and introduce evidence" on that issue as well as any other related issues) as well as Fed. R. Civ. P. 1 (requiring just, speedy, and fair resolution of disputes).

II. The Eighth Circuit's decision is wrong in many ways including in its interpretation of the FCA's tolling provisions and preserving issues for appeal

On the issue of applying the correct statute of limitations provisions, the District Court selected a six-year limitations period rather than apply a three-year tolling provision[13]. The fact that the District Court selected, *albeit* erroneously, the wrong statute from a plurality of

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[13] The District Court did not explain why but it selected the wrong provision. It might have been that it was unaware of the 1986 amendments to the FCA. Had the District Court selected the correct provision, it would have certainly resulted in denying the Rule 9(b) motion.

limitations periods is sufficient to deem that the District Court "passed upon" the issue, in view that the selection of the wrong statute is at odds with the information before the District Court.

The Eighth Circuit was wrong when it stated that a party should "specifically" argue the applicability of a statute of limitations provision, App., at 11a, though the issue was brought up for the first time in a reply brief in the District Court—precluding an opposition by Dr. Joshi—and though the District Court is presumed to have full knowledge of the applicability of the correct statute of limitations[14] because all relevant facts were before it. The Eighth Circuit's ruling on this issue is at odds with the "traditional" rule that an issue is reviewable on appeal if the matter is "pressed" or "passed upon," and that the rule "operates * * * in the disjunctive, permitting review of an issue * * * so long as it has been passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

As shown above, the Eighth Circuit relied on a decision from the Eleventh Circuit which was not in the brief and was brought for the first time on appeal. App., at 12a. It also upheld the district court's ruling that the amendments Dr. Joshi proposed fell outside a six-year statute of limitations period under 31 U.S.C. § 3731(b)(1), which

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[14] Had the Eighth Circuit judicially noted—which it is required to in the interests of justice and fairness even if Dr. Joshi did not "specifically" argue that he was entitled to a 3-year tolling provision in the District Court—the relevant facts which were before the District Court, the case would have survived the motion to dismiss for both the courts below and the defendants essentially conceded—by arguing in the reply brief that the facts were beyond the six-year limitations period—that his proposed amendment complied with Rule 9(b).

point was brought up by the defendant for the first time in a reply brief. App., at 11a, n.3.

Nevertheless, the panel below held that Dr. Joshi did not "specifically" argue the fact that the tolling period of the 1986 Amendments to the FCA applied to his situation, and rejected his argument on those grounds. *Id.*, at 12a. The Eighth Circuit also rejected Dr. Joshi's argument, *Id.*, at 10a, that where a continuing violation was alleged, the specifics need not fall within the limitations period. Implicitly, the court below ruled that even in instances where a plaintiff alleges continuous and systematic fraud of a particular type, the specifics must fall within the *shorter* of the two limitations periods, which is an error because then the allegation of continuity would be superfluous.

The Eighth Circuit's reasoning on preservation is flawed because it ignores that the *presentment* by Dr. Joshi of the facts that fell beyond the six-year period and within the ten-year period (including the three year tolling period, see 31 U.S.C. § 3731(b)(2)) was an "argument" that he believed that these facts were within the limitations period. It was the District Court that selected the six-year statute of limitations with full knowledge that Dr. Joshi filed first within the six year period, dismissed it and then refiled it within the three-year tolling period. A court's selection of one of a plurality of statutes is tantamount to *considering* and *rejecting* the others and thus the issue is passed on. When the District Court passed on the issue, *albeit* erroneously applying the wrong statutory provision, it cannot be stated that Plaintiff should still have "specifically" argued before that court in order to deserve a fair consideration of the merits on appeal, especially by the same court that permitted new arguments in the reply brief and new theories for the first time at oral argument.

III. This case is a good candidate for clarifying the pleading rules under Rule 9(b).

This case comes before this Court with an acknowledged conflict in the circuits on an important issue and further has clearly defined facts and issues. This case also has few disputed facts and a clean sparse record. This Court has not had an occasion to specify what "circumstances" must be pled with particularity under Rule 9(b). At oral argument in *Swierkiewicz*, this Court commented that one is not required to plead evidence under the modern federal pleading rules. Tr. of Oral Arg. at 15, *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002) (No. 00-1853), *(visited 6/22/2006), available on the Internet at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/00-1853.pdf ("[THE COURT]: You are certainly not required to plead the evidence in support of your charge."). Because *Swierkiewicz* was about Rule 8, that case did not present an opportunity to address pleading standards under Rule 9(b). This is that case.

The Eighth Circuit's construction of Rule 9(b) as applied in FCA *qui tam* cases is inconsistent with the liberal notice pleading rules. In *Swierkiewicz*, this Court held that all the civil rules are "inextricably linked" with each other and to Rule 8(a)'s notice pleading standard:

> Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." * * * Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See Conley, supra, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one

> misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

534 U.S. at 513-14. Recognizing that all the federal rules, including Rule 9, are to be interpreted "harmoniously" with the simplified pleading standards of Rule 8, the Eighth Circuit stated that the word "circumstances" need only contain "a higher degree of notice, enabling the defendant to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct." *Abels* v. *Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). This is satisfied when a plaintiff pleads "'such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.'" *Id.* (quoting *Bennett* v. *Burg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *adhered to on reh'g* 710 F.2d 1361 (8th Cir.) (en banc)). The Eighth Circuit also stated that "A plaintiff need not show each factor to plead fraud with sufficient particularity. Instead, a plaintiff must state enough so that the pleadings are not merely conclusory." See *Roberts* v. *Francis*, 128 F.3d 647, 651 n.5 (8th Cir. 1997) Singling out FCA *qui tam* cases from this general standard of liberalized notice pleading, the Eighth Circuit departed from its own and every other circuit's precedent and inaugurated an extremely narrow standard. There is no warrant for such innovation against *qui tam* relators.

Moreover, this is not consistent with this Court's recent reiterations against judicially-imposed heightened pleading standards. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002)(Title VII and ADEA); *Crawford-El* v. *Britton*, 523 U.S. 574 (1998)(qualified immunity); *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993)(claims against municipalities). In these cases, this Court recognized the broader question

as "whether the courts of appeals may craft special procedural rules for such cases to protect," 523 U.S. at 577, a particular class of defendants "from the burdens of trial and discovery", *id.*, and, the Court answered the question in the negative at least in the narrower context of the particular classes of litigants at issue. In each of these cases, this Court rejected heightened pleading beyond those required under the rules. Legal scholars have recognized the import of this trilogy of holdings:

> "In the aftermath of *Leatherman*, antitrust heightened pleading has certainly been curtailed. Finding the *Leatherman* rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases. The Seventh Circuit is illustrative. Soon after *Leatherman*, the court made clear that the "nascent movement" to add judge made exceptions to notice pleading was now precluded. Consequently, antitrust plaintiffs were not required to plead with particularity. Moreover, the court denounced pre-*Leatherman* cases applying heightened pleading as no longer authoritative." [footnotes omitted]

Christopher M. Fairman, The *Myth Of Notice Pleading*, ARIZ. L. REV. Vol. 45:987, 1018-19 (2003). See also Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (criticizing judicially-imposed heightened pleading in civil rights cases and statutory heightened pleading standards under the PSLRA and Y2K Act). In these papers, Professor Fairman explains how heightened pleading made its way from fraud cases to "fraud-like" cases to defamation cases to others without justification. Though this observation was directed to Rule 8 and exceptions thereto, it applies equally well to cases to which Rule 9(b) applies, for the key part of the holding of this Court in the trilogy of cases—that the rules are not pliable based on the type of case—remains the same.

Reinterpreting pleading rules and judicially imposing a heightened pleading for one class of claims or claimants creates chaos sans justification. In Christopher M. Fairman, *An invitation to the rulemakers—strike Rule 9(b)* 38 U.C. DAVIS L. REV. 281-307 (2004), Professor Fairman examines each of the various justifications adduced to support heightened pleading—defense of settled transactions, protection of reputation, deterrence of frivolous or strike suits, and providing adequate notice—states that each of these reasons is no longer valid and doubts whether they were valid at any time. Professor Fariman argues that Rule 9(b) is subject to misuse and that it was inconsistent with this Court's holdings in *Leatherman* and *Swierkiewicz*. He argues that because this Court has soundly rejected heightened pleading in all forms, similar reasons should result in repealing Rule 9(b).

Because this Court has not had an occasion to render its judgment on the proper pleading standard under Rule 9(b), Petitioner respectfully requests the Court to accept this case and clarify the law.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2445

United States ex rel.
Keshav S. Joshi,
Appellant,
v.

St. Luke's Hospital, Inc.,;
Mohammed Bashiti,
Appellees,

United States of America,
Movant Below.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: December 14, 2005
Filed: March 6, 2006

Before WOLLMAN, BEAM, and RILEY, Circuit Judges.

RILEY, Circuit Judge.

Dr. Keshav S. Joshi (Dr. Joshi) brought a *qui tam* action against St. Luke's Hospital, Inc. (St. Luke's), and Dr. Mohammed Bashiti (Dr. Bashiti), St. Luke's chief of

anesthesiology, pursuant to the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Dr. Joshi's complaint alleges that from 1989 to the present, St. Luke's and Dr. Bashiti submitted and conspired to submit false claims to the government seeking payment for anesthesia services, medical supplies, and prescriptions. The district court[1] granted St. Luke's and Dr. Bashiti's motion to dismiss for failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b). The court also denied Dr. Joshi's motion to amend the complaint, concluding the proposed amendments described incidents that fell outside the statute of limitations period and did not cure the complaint's deficiencies. Dr. Joshi appeals. Finding no error, we affirm.

I. BACKGROUND

In April 2004, Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke's, brought a *qui tam* action under the FCA against St. Luke's and Dr. Bashiti, alleging violations of 31 U.S.C. § 3729(a)(1) and (a)(3). In his complaint, Dr. Joshi asserts "he is an 'original source' who has direct and independent knowledge of the information" on which his allegations are based. In Count I, Dr. Joshi alleges St. Luke's requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of anesthesia services, when St. Luke's was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleges Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several

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[1] The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

certified registered nurse anesthetists (CRNAs). Dr. Joshi further alleges in Count I St. Luke's sought reimbursement for supervised CRNA work, when in fact such work was unsupervised, in violation of Missouri state law. In Count II, Dr. Joshi alleges St. Luke's knowingly submitted false claims to the government for services that were not performed and for supplies that were not provided. The complaint alleges "St. Luke's would bill Medicaid and Medicare for an entire box of supplies or an entire prescription, while using only a small portion of said supplies/prescription on the Medicaid/Medicare patient for whom said supplies and prescriptions were billed."

Both counts allege the existence of a conspiracy between "[St. Luke's and Dr. Bashiti], each of them and/or their employees and agents . . . for the purpose of defrauding the United States in violation of 31 U.S.C. § 3729(a)(3) with an intent to increase their pecuniary gain." However, Dr. Joshi's complaint does not identify specifically the date, amount, or content of, or the persons involved in making, any false claims submitted by St. Luke's. Nor does the complaint specify the dates on which supplies or prescriptions were used or billed, the patients who received the supplies or prescriptions, or the type of supplies or prescriptions involved in the alleged fraudulent scheme. Rather, Dr. Joshi alleges "St. Luke's had all the work done by the CRNAs and Dr. Bashiti assigned to itself," and "[t]he medical bills to the government sufficiently identify the time, place, and content of the fraudulent representations."

St. Luke's and Dr. Bashiti filed a motion to dismiss the complaint for failure to plead fraud with particularity under Rule 9(b). Dr. Joshi opposed the motion, and, alternatively, sought leave to amend the complaint by adding specific allegations of fraud. Dr. Joshi proposed to amend Count I by adding a table summarizing

anesthesia services performed on four days in November 1995 by CRNAs and Dr. Bashiti at St. Luke's. The table and accompanying allegations indicate the time, surgeon, patient initials, and CRNA who performed anesthesia services. Dr. Joshi alleges this proposed amendment establishes the anesthesia services performed by CRNAs were unsupervised by Dr. Bashiti because Dr. Bashiti performed anesthesia services at the same time on other patients, and Dr. Bashiti falsely certified he either directed or supervised the CRNA work. With regard to Count II, Dr. Joshi, based on "information and belief," proposed to add a table summarizing medications issued to seven patients (identified by their initials) during six days in November 1995. The table and accompanying allegations indicate the patients were administered a particular quantity of medicine and St. Luke's billed the government for a quantity greater than the amount actually administered.

The district court granted St. Luke's and Dr. Bashiti's motion to dismiss, concluding the complaint failed to satisfy Rule 9(b)'s particularity requirement and failed to give St. Luke's and Dr. Bashiti notice of the alleged misconduct to allow them to defend properly against the charge. The court reasoned, "Without any allegations about who specifically participated in these claims and how and when the claims were submitted, [St. Luke's and Dr. Bashiti] are unable to marshal a defense."

The court also denied Dr. Joshi's request for leave to amend the complaint, finding Dr. Joshi's claims with new November 1995 data were barred by the applicable six-year statute of limitations[2] and did not cure the deficiencies of Dr. Joshi's original complaint.

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[2] Under 31 U.S.C. § 3731(b)(1), complaints alleging violations of the FCA may not be brought "more than 6 years after the date on which the violation . . . is committed." Dr.

(Continued on following page)

Dr. Joshi appeals, arguing the district court erred in (1) dismissing his complaint, because Joshi satisfied Rule 9(b)'s particularity requirement by alleging each and every invoice for CRNA work was fraudulent; (2) denying Dr. Joshi leave to amend the complaint, because the proposed amendments are timely and would not have been futile; and (3) refusing to allow Dr. Joshi to conduct discovery necessary to satisfy Rule 9(b), because the facts of St. Luke's and Dr. Bashiti's fraudulent conduct are uniquely within the control of St. Luke's and Dr. Bashiti.

II. DISCUSSION

A. Standard of Review

The issues raised in this appeal are governed by two standards of review. First, we review de novo the district court's order granting the motion to dismiss, accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005) (citation omitted). Second, we review for abuse of discretion the district court's denial of the motion to amend the complaint. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 871 (8th Cir. 2002) (citation omitted). However, we review de novo the underlying legal conclusion of whether the proposed amendments to the complaint would have been futile. *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 904 (8th Cir. 2005) (citation omitted); *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 936 (8th Cir. 2001).

Joshi filed his complaint in April 2004. Violations occurring before April 1998 are barred.

B. Dismissal of Complaint

Dr. Joshi's complaint alleges violations of the FCA, particularly 31 U.S.C.

§ 3729(a)(1) and (a)(3), which subjects to civil liability entities that knowingly submit or conspire to submit false claims to the government for payment or approval. See, *e.g.*, *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005) (per curiam). Because the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply with Rule 9(b). *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003). Under Rule 9(b), "the circumstances constituting fraud . . . shall be stated with particularity." Rule 9(b)'s "particularity requirement demands a higher degree of notice than that required for other claims," and "is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 888 (8th Cir. 2003) (citing *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920-21 (8th Cir. 2001)). To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. See, *e.g.*, *Corsello*, 428 F.3d at 1012; *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 746 (8th Cir. 2002). Put another way, the complaint must identify the "who, what, where, when, and how" of the alleged fraud. Costner, 317 F.3d at 888 (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997)). After taking the allegations contained in Dr. Joshi's complaint as true and drawing all reasonable inferences in his favor, we agree with the district court, Dr. Joshi

failed to allege with any specificity the particular circumstances constituting St. Luke's and Dr. Bashiti's alleged fraudulent conduct. Absent from the complaint are any mention of (1) the particular CRNAs who allegedly performed patient care and administered anesthesia services unsupervised, (2) when Dr. Bashiti falsely claimed to have supervised or directed CRNAs, (3) who was involved in the fraudulent billing aspect of the conspiracy, (4) what services were provided and to which patients the services were provided, (5) what the content was of the fraudulent claims, (6) what supplies or prescriptions were fraudulently billed and to which patients the supplies or prescriptions were provided, (7) what dates the defendants allegedly submitted the false claims to the government, (8) what monies were fraudulently obtained as a result of any transaction, or (9) how Dr. Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment. Simply put, the complaint fails to identify specifically the "who, what, where, when, and how" of the alleged fraud.

Notwithstanding these deficiencies, Dr. Joshi contends his complaint satisfies Rule 9(b)'s particularity requirement by his allegations that "all the nurse anesthetists' work was illegal," and that "every invoice for nurse anesthetist work was fraudulent because no nurse anesthetist was medically supervised or directed." In support of this argument, Dr. Joshi points to paragraph eighteen of the complaint, which states "St. Luke's had all the work done by the CRNAs and Dr. Bashiti assigned to itself." Such an argument fails for two reasons. First, Dr. Joshi advances a *post hoc* interpretation that is unsupported by the complaint's generalized and vague language. If it is Dr. Joshi's position his complaint put St. Luke's and Dr. Bashiti on notice Dr. Joshi was alleging "every" claim for anesthesia services was fraudulent, we respectfully

disagree. Second, assuming *arguendo* the complaint can be interpreted to have alleged "every" claim was fraudulent, Rule 9(b) requires more than such conclusory and generalized allegations. See *Schaller*, 298 F.3d at 746 (explaining [c]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy [Rule 9(b)]" (quoting *Commercial Prop. Inv. v. Quality Inns*, 61 F.3d 639, 644 (8th Cir. 1995))); see also Costner, 317 F.3d at 889 (concluding the plaintiff's complaint was "not specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong" (citation omitted)).

We find persuasive the Eleventh Circuit's reasoning in *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1011 (11th Cir. 2005) (per curiam), in which the relator alleged his former employers violated the FCA by falsifying certificates of medical necessity and billing for unnecessary or nonexistent treatment to obtain Medicare payments unlawfully. The relator, a sales employee who did not work in the billing department, did not allege any details concerning false claims actually submitted for payment; rather, he vaguely alleged the fraudulent schemes were pervasive and wide-reaching in scope, and argued the defendants must have submitted fraudulent claims. *Corsello*, 428 F.3d at 1013. The Eleventh Circuit noted the allegations "failed to provide a factual basis to conclude fraudulent claims were ever actually submitted to the government in violation of the [FCA]." Id. Thus, the court dismissed the relator's complaint for failure to plead fraud with particularity, noting the allegations lacked sufficient "'indicia of reliability' . . . because they failed to provide an underlying basis for [the relator's] assertions." *Id.* at 1013-14. Similarly, in the present case Dr. Joshi's allegation that "every" claim submitted by St.

Luke's was fraudulent lacks sufficient "indicia of reliability." Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department, and his conclusory allegations are unsupported by specific details of St. Luke's and Dr. Bashiti's alleged fraudulent behavior.

We fully recognize Dr. Joshi alleges a systematic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit fraudulent claims over a sixteen-year period. Clearly, neither this court nor Rule 9(b) requires Dr. Joshi to allege specific details of *every* alleged fraudulent claim forming the basis of Dr. Joshi's complaint.

However, to satisfy Rule 9(b)'s particularity requirement and to enable St. Luke's and Dr. Bashiti to respond specifically to Dr. Joshi's allegations, Dr. Joshi must provide *some* representative examples of their alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors. Dr. Joshi's complaint is void of a single, specific instance of fraud, much less any representative examples. Thus, the district court properly dismissed Dr. Joshi's complaint for failure to comply with Rule 9(b).

C. Denial of Request for Leave to Amend the Complaint

Under Federal Rule of Civil Procedure 15(a), a court should grant leave to amend freely "when justice so requires." However, "denial of leave to amend may be justified by undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party." *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 936 (8th Cir. 2001) (internal quotation omitted).

In denying Dr. Joshi's motion for leave to amend the complaint on the basis of futility, the district court held Dr. Joshi's proposed amendments did not cure the complaint's deficiencies because St. Luke's and Dr. Bashiti were "still forced to speculate as to names of patients, supplies, prescriptions, and claims over a sixteen year period to determine what activity allegedly violate[d] the FCA." The district court also held that because the specific instances of fraud cited by Dr. Joshi all occurred in November 1995 and Dr. Joshi failed to tie the allegations into a continuous pattern of conduct by St. Luke's and Dr. Bashiti, the six-year statute of limitations barred the additional claims. On appeal, Dr. Joshi contends the district court erred in denying his motion, arguing the proposed amendments are timely and would not have been futile. We reject both contentions.

First, Dr. Joshi's proposed amendments do not eliminate the complaint's deficiencies. Neither proposed amendment indicates Dr. Joshi's basis for knowledge concerning the alleged submission of fraudulent claims, and the amendments thus lack sufficient "indicia of reliability" to satisfy Rule 9(b). See *Corsello*, 428 F.3d at 1013-14. Dr. Joshi's vague and limited allegations concerning events occurring in November 1995 do not qualify as representative examples of a scheme alleged to have occurred over a sixteen-year period. Furthermore, basing Count II's proposed amendment on "information and belief" does not strengthen Dr. Joshi's complaint when Dr. Joshi neglects to "set forth the source of the information and the reasons for the belief." See Parnes, 122 F.3d at 550 (citation omitted). Even accepting the allegations as true and drawing all reasonable inferences in Dr. Joshi's favor, the proposed amendment fails to contribute the requisite specificity to Dr. Joshi's nebulous complaint. Thus, we agree with the district

court, Dr. Joshi's proposed amendment does not satisfy the heightened pleading standard of Rule 9(b).

Second, the proposed amendments are untimely. Dr. Joshi filed his complaint in the present action in April 2004. We agree again with the district court. Dr. Joshi failed to tie his additional allegations, which allege specific instances of fraud occurring in November 1995, into a continuous pattern of conduct, and the proposed amendments are barred by the applicable six-year statute of limitations. See 31 U.S.C. § 3731(b)(1). Furthermore, the three-year tolling provision of 31 U.S.C. § 3731(b)(2) does not alter our conclusion. Section 3731(b)(2) provides an action under the FCA may not be brought "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." Dr. Joshi did not specifically argue the applicability of § 3731(b)(2) before the district court,[3] and we therefore need not consider this argument. See *Wever v. Lincoln County, Neb.*, 388 F.3d 601, 608 (8th Cir. 2004) ("Ordinarily, this court will not consider arguments

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[3] In response to Dr. Joshi's proposed amendments to the complaint, St. Luke's raised before the district court the statute of limitations issue in its reply memorandum, arguing Dr. Joshi's November 1995 allegations fell outside the six-year limitations period set forth in § 3731(b)(1). Dr. Joshi then filed a surreply, arguing (erroneously) St. Luke's waived any argument regarding the limitations period by filing a motion to dismiss for failure to plead fraud with particularity, as opposed to a motion to dismiss on statute of limitations grounds. Dr. Joshi did not argue the proposed amendment fell within the limitations period pursuant to § 3731(b)(2), and thus argues the applicability of § 3731(b)(2) for the first time before this court.

raised for the first time on appeal.") (citation omitted); *Hartford Acc. & Indem. Co. v. Shaw*, 273 F.2d 133, 140 (8th Cir. 1959) ("[A]n appellant cannot for the first time in an appeal raise an issue that was not presented to the trial court and upon which the trial court [illegible] opportunity to pass.").

However, in short, we [illegible] argument on the applicability of § 3731(b)(2) lacks merit. Dr. Joshi alleged he is an "original source" of the complaint's allegations, he worked at St. Luke's only until January 1996, and Dr. Joshi's staff position is the sole basis alleged for his knowledge of the fraudulent billing. Assuming, without deciding, § 3731(b)(2) applies to a private individual where the government declines to intervene, Dr. Joshi's allegations support a conclusion he was aware of the alleged FCA violations well before April 2001, more than three years before suit was filed. Thus, we conclude the district court did not err in denying Dr. Joshi's motion for leave to amend the complaint.

D. Refusal to Permit Discovery or Relax Rule 9(b)'s Particularity Requirement

Finally, Dr. Joshi argues the district court erred in not permitting him to conduct discovery in order to satisfy Rule 9(b)'s pleading requirements. Although Dr. Joshi couches his argument in terms of a discovery request, we view his argument more generally as a request to relax Rule 9(b)'s pleading requirements by allowing him to plead his complaint generally at the outset and to "fill in the blanks" following discovery.

The issue of whether to relax Rule 9(b)'s pleading requirements for complaints brought under the FCA and to permit early discovery is one of first impression in this circuit. "[S]ome courts have recognized in theory that the

particularity requirements of Rule 9(b) may be relaxed in an FCA *qui tam* action where the information relevant to the fraud is 'peculiarly within the perpetrator's knowledge.'" *United States ex rel. Karvelas v. Melrose-*

at 229, 231 (holding "a qui tam relator may not present general allegations in lieu of the details of actual false claims in the hope that such details will emerge through subsequent discovery"). We join the more recent decisions and therefore reject Dr. Joshi's request to permit discovery to satisfy Rule 9(b). As the First Circuit noted, "[t]he reluctance of courts to permit qui tam relators to use discovery to meet the requirements of Rule 9(b) reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs." *Id.* at 231 (internal quotation omitted). The Eleventh Circuit reasoned, "[w]hen a plaintiff does not specifically plead the minimum elements of [his] allegation, it enables [the plaintiff] to learn the complaint's bare essentials through discovery and may needlessly harm a defendant['s] goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, are [sic] baseless allegations used to extract settlements." *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313-14 n.24 (11th Cir. 2002).

Furthermore, the FCA requires a *qui tam* relator to serve a copy of the complaint on the government and disclose all material evidence and information known to the relator in order to allow the government to decide whether or not to intervene. 31 U.S.C. § 3730(b)(2). "[A]llowing a qui tam relator to amend his or her

complaint after conducting further discovery would mean that the government will have been compelled to decide whether or not to intervene absent complete information about the relator's cause of action." *Karvelas*, 360 F.3d at 231 (internal quotation omitted). Such an approach is inconsistent with the relator's procedural obligations under the FCA and with the FCA's protections for the government, the real party in interest in a *qui tam* action. See *id.*

Dr. Joshi contends a relaxed pleading standard is appropriate in cases such as this where the fraudulent scheme was complex, the fraudulent conduct took place over a long period of time, and information concerning the alleged fraud is uniquely within the defendants' control. While we recognize the difficult burden Dr. Joshi bears in constructing his complaint, we decline to adopt Dr. Joshi's position. As the district court noted, Dr. Joshi's argument conflicts with his allegation he is an "original source" of St. Luke's and Dr. Bashiti's alleged fraudulent conduct. See 31 U.S.C. § 3730(e)(4)(B) (stating a person is an "original source" when he "has direct and independent knowledge of the information" forming the basis of the allegations); *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) ("Under the [FCA], federal courts do not have jurisdiction over an action based upon public disclosure of allegations or transactions unless the person bringing the action is an original source of the information." (internal quotation omitted)). Although it may be difficult for Dr. Joshi to draft a complaint alleging sufficient details regarding a fraudulent Medicare billing scheme spanning a sixteen-year period, such a burden is not, as Dr. Joshi puts it, an "impossible hurdle" to overcome. Nothing requires Dr. Joshi to state every factual detail concerning every alleged fraudulent claim submitted during the last sixteen years; rather, Dr. Joshi

need only plead some representative examples within the statute of limitations.

Concededly, the nature of Dr. Joshi's position with St. Luke's as an anesthesiologist, rather than as a member of St. Luke's billing or claims department, may not have made him privy to certain details relevant to his complaint and helpful to satisfying Rule 9(b). However, "while an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the [FCA], neither the Federal Rules nor the [FCA] offer any special leniency under these particular circumstances to justify [Dr. Joshi] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action."[4] See *Clausen*, 290 F.3d at 1314. As this court

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[4] In support of his argument, Dr. Joshi points to *Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998), in which the Seventh Circuit relaxed Rule 9(b)'s pleading requirements in the context of a claimed violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. We find Emery's rationale inapplicable to the present FCA case. "The major purpose behind RICO is to curb the infiltration of legitimate business organizations by racketeers." *Sinclair v. Hawke*, 314 F.3d 934, 943 (8th Cir. 2003) (citation omitted). On the other hand, the focus of the FCA, an anti-fraud statute, is "exposing fraud on the government and recovering resulting government losses." *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998). "Qui tam relators cannot and do not sue for FCA violations on their own behalf. Rather, they sue on behalf of the government as agents of the government, which is always the real party in interest." *Id.* (citation omitted). Additionally, the FCA requires the relator be an "original source." See 31 U.S.C. § 3730(e)(4)(B). No analogous requirement exists under RICO. Thus, we agree with St. Luke's and Dr. Bashiti's argument that "the fact that

(Continued on following page)

stated in *Kinney*, "The [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing." *Kinney*, 327 F.3d at 674 (citation omitted). Furthermore, "a plaintiff should not be able to avoid the specificity requirements of Rule 9(b) by relying upon the complexity of the edifice which he created." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 564 (6th Cir. 2003) (internal quotation omitted). Thus, we hold the district court did not err in refusing to relax Rule 9(b)'s pleading requirements and allow discovery by Dr. Joshi.

III. CONCLUSION

Agreeing with the district court, for the reasons stated, we affirm the judgment of the district court.

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relaxation of Rule 9(b) may be appropriate under certain circumstances in the RICO context does not aid [Dr. Joshi] in this FCA case."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

United States ex rel.	)
Keshav S. Joshi, M.D.,	) CaseNo.4:04CV489RWS
Relator	)
	)
v.	)
	)
St. Luke's Episcopal -	)
Presbyterian Hospitals, a	)
Missouri Nonprofit	)
Corporation, et al.,	)
Defendants.	)

MEMORANDUM AND ORDER

This matter is before me on defendants' motion to dismiss for failure to plead the circumstances of fraud with particularity[1]. For the reasons stated, I will grant defendants' motion to dismiss.

Background

Keshav S. Joshi, an anesthesiologist, had staff privileges which enabled him to work as a doctor at St. Luke's Hospital from 1989 until 1996. Mohammed Bashiti, also an anesthesiologist, is a current employee of St. Luke's Hospital. In Count I of his two-count complaint, Joshi alleges that from 1989 to the present Bashiti and St. Luke's submitted, and conspired to submit, false claims to the government for anesthesia

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[1] Although the motion was filed by St. Luke's Hospital, Dr. Bashiti filed a memorandum of joinder in the hospital's motion to dismiss. Therefore, I treat the motion to dismiss as if it were filed on behalf of both defendants.

services rendered by Bashiti, or under his supervision, in violation of the False Claims Act (FCA), 31 U.S.C. Sections 3729(a)(1) and (3).

The FCA permits private citizens, acting on behalf of the government, to bring civil actions against persons who submit false claims for money to the government.[2]

Count II of Joshi's complaint alleges that from 1989 to the present St. Luke's submitted, and conspired to submit, false claims to the government for medical supplies and prescriptions used or issued to treat patients at St. Luke's. In Counts I and II, Joshi also alleges the existence of an FCA conspiracy under 31 U.S.C. 3729(a)(3).

Defendants move to dismiss both counts of the complaint for failure to plead the circumstances of fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

Standard of Review

In ruling on a motion to dismiss, the Court must accept as true all the factual allegations in a complaint and view them in the light most favorable to the plaintiff. *Kohl v. Casson*, 5 F.3d 1141, 1148 (8th Cir. 1993). Generally, a complaint may be dismissed for failure to state a claim only if it appears, beyond a reasonable doubt, that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Atkinson v. Bohn*, 91 F.3d 1127, 1128 (8th Cir. 1996). Federal Rule of Civil Procedure 9(b), however, provides for a heightened pleading standard when addressing fraud:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and

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[2] The government declined to intervene in this action.

other condition of mind of a person may be averred generally.

A complaint alleging violations of the False Claims Act must be pled with particularity pursuant to Rule 9(b). *United States ex rel. Kinney v. Stolz*, 327 F.3d 671, 674-75 (8th Cir. 2003). This particularity requirement demands a higher degree of notice than that required for other claims. The claim must identify who, what, where, when, and how. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997). Rule 9(b) is to be read in the context of the general principles of the Federal Rules, the purpose of which is to simplify pleading. The particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations. *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920-21 (8th Cir. 2001).

Discussion

Defendants first argument in support of dismissal is that Joshi's claims fall well outside the FCA's six-year statute of limitations.[3] Because Joshi has alleged that the fraud is ongoing and continuing into the present, I must deny the motion to dismiss on this basis.

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[3] The FCA's limitations period of activity that falls within the statue of limitations provides that "a civil action under section 3730 [civil actions for false claims] may not be brought– (1) more than 6 years after the date on which the violation of section 3729 [false claims] is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C.A. § 3731(b) (1994).

Alternatively, defendants argue that the complaint should be dismissed for failure to plead fraud with particularity. In his complaint, Joshi alleges generally that defendants submitted false claims "from 1989 to the present." Defendants contend that this allegation falls short of the particularity requirement of Rule 9(b) because Joshi provides no specific information about these alleged false claims.

The complaint is "not specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *United States ex rel. Costner v. USR Consultants, Inc.*, 317 F.3d, 883, 889 (8th Cir. 2003)(citing *United States ex rel. Lee v. SmithKline Beecham Clinical Labs.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001)). Without any allegations about who specifically participated in these claims and how and when the claims were submitted, defendants are unable to marshal a defense. For example, the lack of specificity prevents them from locating potential witnesses and relevant documents or even retaining expert witnesses to support their case.

Joshi argues that he cannot provide more detailed allegations because information about the fraud is uniquely within the control of the defendants. This argument is inconsistent with Joshi's allegations that he personally witnessed fraudulent billing practices. Moreover, even if true, it does not excuse Joshi's obligations under 9(b). Although the Eighth Circuit Court of Appeals has yet to rule on this issue, other courts have held that difficulty in obtaining information does not excuse an FCA plaintiff's obligation to state all allegations with particularity. See *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004) (ruling that allowing a relator to plead generally at

the outset and amend the complaint at the 12(b)(6) stage after discovery would be at odds with the FCA's procedures for filing a qui tam action and its protections for the government); see also *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1314 (11th Cir. 2002) (rejecting arguments to apply a more lenient pleading standard because evidence of fraud was uniquely held by the defendant).

Joshi also contends that the information is too voluminous, and that listing every instance of fraud would be overly burdensome and too detailed. Instead, Joshi argues that details are better revealed during the course of discovery and should not be listed in the complaint. Joshi's argument fails because it is inconsistent with the requirements of Rule 9(b). More details, including specific examples of actual false claims, are required to state a claim under the FCA. See *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1314 (11th Cir. 2002) (indicating a need to allege at least some examples of actual false claims to lay a complete foundation for the rest of his allegations).

Defendants' motion to dismiss will be granted for failure to plead fraud with the particularity required by Federal Rule 9(b).

Joshi's Motion for Leave to Amend

Joshi seeks leave to amend his complaint to provide additional detail lacking in the original complaint. Generally, where a complaint is dismissed under Rule 9(b) for failure to plead with particularity, leave to amend is granted. *Massie v. Bd. of Trustees, Haywood Community College*, 2005 WL 375594, at *4 (W.D.N.C. Feb. 16, 2005); see FED. R CIV. P. 15(a). Federal Rule of Civil Procedure 15(a) mandates that a court provide leave to amend freely "when justice so requires." In this case, however, the proposed amendments do not cure the

defects of the original complaint, so leave to amend will be denied as futile.

In his proposed amendments, Joshi contends that false claims have been filed from 1989 until the present, but the only specific incidences of fraud actually cited by Joshi occur within a one month period in November of 1995. These claims are barred by the statute of limitations and, standing alone, cannot state an FCA claim as a matter of law. Although Joshi alleges a continuous violation, he provides no specific allegations of fraud within the limitations period that would tie these otherwise time-barred claims into a continuous pattern of conduct. Even with these additional allegations, defendants are still forced to speculate as to names of patients, supplies, prescriptions, and claims over a sixteen-year period to determine what activity allegedly violates the FCA. Joshi's proposed amendments do not cure the deficiencies of the complaint.

Defendants are entitled to a complaint that adequately lays out the claims against them so that they may be able "to respond specifically, at an early stage of the case, to potentially damaging allegations." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). Because Joshi's proposed amended complaint does not meet the heightened pleading standard of Rule 9(b), the motion for leave to amend will be denied as futile.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion to dismiss [#14] is **GRANTED**, and plaintiff's complaint is dismissed.

IT IS FURTHER ORDERED that plaintiff's motion for leave to amend is **DENIED**.

-/s/-

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 13th day of April, 2005.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2445

United States ex rel. Keshav S. Joshi	*
	*
Appellant,	* Order Denying Petition for
	* Rehearing and for
vs.	* Rehearing En Banc
	*
St. Luke's Hospital, Inc., et al.,	*
	*
Appellees.	*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

April 12, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit